Supreme Court, U.S.
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No. 95-538

In The

Supreme Court of the United States

October Term, 1995

In re: BERNARD J. DOLENZ,

Petitioner,

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

BERNARD J. DOLENZ
6102 Swiss Avenue
Dallas, Texas 75214
(214) 821-0220
TX Bar No. 05957750
Petitioner, Pro Se

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PETITIONER'S REPLY BRIEF

TO THE HONORABLE SUPREME COURT:

The Petitioner, Bernard J. Dolenz, respectfully requests this Honorable Court consider this his Reply to Respondent's Brief in Opposition.

Nationwide appears to be in massive denial by asserting that this is NOT A WORKER'S COMPENSATION CASE, and therefore not a "direct action" within the meaning of 28 U.S.C. Section 1332(c).

That this is a Worker's Compensation case plus more is made clear in Plaintiff's First Amended Complaint:

" . . . Bernard J. Dolenz will be suing the Defendant as Bernard J. Dolenz, ("Dolenz"), on behalf of Bradley Graves as assignor, as well as the beneficiary of the workers' compensation benefits as allowed by common law and by statute . . .

2. The Texas Workers' Compensation Commission (TWCC) Award was in favor of Dolenz but was incorrect in the amount awarded. That award was timely appealed by the carrier as well as Dolenz within 20 days from the date of giving of such award . . .

Dolenz has done all conditions precedent necessary to maintain this action . . .

. . . The $25,624.51 is the amount due and owing for the "underlying workers' compensation claim". The amount of the account is just as the prices charges are in accordance with the usual, customary or reasonable charges for like services in Dallas County . . .

. . . The carrier recognized the doctor/patient relationship with Bradley Graves and Dr. Bernard J. Dolenz, and indicated and noticed Dr. Dolenz that the carrier IS RESPONSIBLE FOR ALL REASONABLE AND NECESSARY MEDICAL TREATMENT RENDERED IN CONNECTION WITH THE INJURY . . . EXHIBIT "E". (Emp. given in Complaint).

. . . Under the circumstances Carrier was reasonably notified by reports and billings and were noticed that Dolenz in performing such services was expecting to be paid by Carrier pursuant to the W/C Act.

WHEREFORE PREMISES CONSIDERED, Bernard Dolenz respectfully prays that Carrier pay damages as follows:

. . . k. Dolenz prays also that the workers' compensation award be set aside as the final decision and award of the Texas Worker's Compensation Commission entered on November 18, 1992 did not reflect the full account due for the reasonable and necessary care and treatment given Mr. Bradley Graves; and . . . "

This is a W/C case; but it is also more because the Carrier did not pay for the services rendered Bradley Graves for his dorsal spinal stenosis, a very painful problem, and refused him his prescriptions and neurosurgical consultations, elevating this W/C to additional causes of action for such egregious and abhorrent conduct. Unfortunately, Nationwide is not the only carrier culpable of this type of bad conduct, impacting adversely upon this nation's health care.

Summary Judgment was not only improperly granted because it lacked diversity jurisdiction, but there were genuine issues which were not handled such as the appeal of the W/C award as allowed by TWC Act, Article 8307, Sec. 5; the sworn account; the determination of the fees due pursuant to the ambiguous phrase "reasonable and necessary" contractual language; and the various torts alleged. As this court knows, summary judgment is rare because issues of "negligence", "due care" and "proximate causation" usually require jury resolution of competing inferences. WESTFALL V. ERWIN, 484 U.S. 292, 102 S. Ct. 580 (1988); ZIMZORES V. VETERANS ADMIN. (5th Cir. 1985), 778 F2d 264. The ambiguity of "reasonable and necessary" in a contract relationship with W/C cases are susceptible to more than one reasonable interpretation and raises triable issues. SOUTHERN NATURAL GAS CO. V. PURSUE ENERGY (5th Cir. 1986), 781 F2d 1079, 1081.

CONCLUSION

This is a workman's compensation case, contrary to the assertions of Nationwide and is a "direct action" case within the meaning of 28 U.S.C. Sec. 1332(c). This case lacked diversity and should be remanded back to state court. If this Court believes that Nationwide misstated and was disingenuous in its representations, this Petitioner would seek sanctions pursuant to Rule 11 and any other relief that this Honorable Court would consider equitable.

Respectfully submitted,

BERNARD J. DOLENZ, J.D., M.D.
6102 Swiss Avenue
Dallas, Texas 75214
(214) 821-0220
Texas Bar Card No. 05957750